IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 27, 2007 Session

JEFF FINCHUM and MICHELLE FINCHUM d/b/a SHOCKWAVE CUSTOMS
v.
TINA DAVENPORT PATTERSON d/b/a SHELTER INSURANCE COMPANY

Appeal from the Circuit Court for Bedford County
No. 9478 Franklin L. Russell, Judge

No. M2007-00559-COA-R3-CV - Filed May 9, 2008

This is an insurance case. The plaintiffs operated a business engaged in the installation of automobile accessories and stereo equipment. The defendant insurance agency sold to the plaintiffs a commercial fire insurance policy that excluded coverage for loss from theft and stated that only the insurance company was authorized to amend the policy. While the policy was in effect, thieves broke into the plaintiffs' store and stole or damaged equipment and merchandise. The insurance company denied coverage The plaintiffs filed a lawsuit in general sessions court against the defendant insurance agency, alleging that the defendant had represented to them that the policy covered loss caused by theft, that they relied on this representation to their detriment, and, therefore, that the defendant insurance agency should be estopped from relying on the exclusion of theft in the policy. After a judgment for the defendant, the plaintiffs appealed to the circuit court. The circuit court held for the plaintiffs, based on estoppel. The defendant insurance agency now appeals. We reverse. We hold first that equitable estoppel is not applicable against the insurance agent because the insurance company, not the agent, denied coverage under the policy. Second, the plaintiffs are charged with knowledge of the terms of the insurance contract they signed, including the provision indicating that only the insurance company could amend the terms of the policy, which clearly excluded losses from theft.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and DAVID R. FARMER, J., joined.

W. Carl Spining, Charles H. Crocker Jr., and Michael T. Schmitt, Nashville, Tennessee, for the appellant Tina Davenport d/b/a Shelter Insurance Company

John H. Norton and Liberti A. Snider, Shelbyville, Tennessee, for the appellees Jeff Finchum and Michelle Finchum d/b/a Shockwave Customs

OPINION

Defendant/Appellant Tina Davenport Patterson ("Davenport") operates the Tina Davenport Shelter Insurance Agency, through which she sells insurance policies underwritten by the Shelter Insurance Company. The agency is a sole proprietorship located in Shelbyville, Tennessee. Plaintiff/Appellees Jeff Finchum ("Mr. Finchum") and Michelle Finchum ("Ms. Finchum") (collectively, "the Plaintiffs") operate a business known as Shockwave Customs ("Shockwave"), which installs custom audio equipment on automobiles, also located in Shelbyville. At one time, the Plaintiffs operated Shockwave with a third party. The third party had secured insurance for the business through an agency in Manchester, Tennessee. The original policy included coverage for theft. Under the original policy, the insured parties were Mr. Finchum and the third party. When the third party left the business, the Plaintiffs had to obtain new insurance.

In approximately July 2000, Ms. Finchum contacted Davenport, with whom Ms. Finchum became acquainted during school, to discuss a new insurance policy for Shockwave.[1] At that time, Shockwave was located at 801 East Lane Street in Shelbyville. During a telephone conversation, Ms. Finchum and Davenport discussed several different policies. Ms. Finchum eventually decided to purchase a commercial fire insurance policy with a liability limit of $10,000, as well as a garage keepers' liability policy that would cover damage to or theft of a customer's automobile while it was in the Plaintiffs' possession. Both policies were underwritten by Shelter Insurance Company. Under the commercial fire policy, Shockwave was covered for loss of or damage to the building, such as permanently installed machinery, fixtures, and appliances, as well as loss or damage to business personal property, such as furniture, machinery, and stock. The policy also included a provision addressing the covered causes of loss, which stated:

> Covered Causes of Loss means the following:
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> **1.** Fire.
>
> **2.** Lightning.
>
> . . .
>
> **8.** Vandalism, meaning willful and malicious damage to, or destruction of, the described property.
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> *We will not pay for loss or damage caused by or resulting from theft*, except for building damage caused by the breaking in or exiting of burglars.

(emphasis added). Thus, the policy specifically excluded coverage for theft losses. The policy also stated, "This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy." The policy also states, "The words 'we,' 'us' and 'our' refer to the Company providing this insurance," that is, Shelter Insurance Company. Ms. Finchum received the policy and looked through it, but primarily focused on whether the policy included the $10,000 liability limit, and did not read either the exclusion for theft or the provision stating that only Shelter could amend the policy terms.

[1] Mr. Finchum had no direct conversations with anyone concerning insurance coverage.

On approximately April 22, 2002, the Plaintiffs moved Shockwave from 801 East Lane Street to its current location at 906 Madison Street in Shelbyville. The new store location had more room for inventory and equipment, so Ms. Finchum called Davenport's office to discuss an increase in the liability limit in their policy. Davenport's mother, Jean Patterson ("Patterson"), who is a licensed insurance agent and one of Davenport's employees, handled the change in Shockwave's insurance policy. The only change in the policy was an increase in the liability limit from $10,000 to $75,000.

In the early morning hours of May 10, 2002, thieves threw a rock through the front window of the Shockwave store to gain entry. Once inside, they stole or damaged almost $12,000 worth of equipment and merchandise. One of the items damaged was a 1991 Toyota "show truck" in Shockwave's showroom, which was used to demonstrate products.

At approximately 8:00 a.m. on May 10, the Plaintiffs received a telephone call from the police informing them of the break-in. After the police, Mr. Finchum was the first person to arrive on the scene. When Ms. Finchum arrived, she called Davenport's office to report the break-in. In response, Davenport's mother, Patterson, went to the Shockwave store and took photographs of the damage.

After the break-in, in completing a proof of loss form for her insurance claim, Ms. Finchum prepared a sworn statement listing all items that were stolen or damaged, including the value of each item. She then gave the proof of loss form to Davenport, who notarized it and sent it to the Shelter Insurance Company.

Ms. Finchum later received a telephone call from an insurance adjustor for Shelter Insurance, informing her that Shelter would not pay for the damage to the Toyota show truck because the insurance company had not been told that the truck was located in the store.[2] Subsequently, Shelter Insurance denied coverage for any of the theft loss or damage at Shockwave, citing the exclusion for theft in the Shelter policy.

After Shelter's denial of coverage, the Plaintiffs filed a lawsuit against Davenport in the Bedford County General Sessions Court, seeking payment of their insurance claim in the amount of $11,913.40. Judgment was rendered in favor of Davenport. The Plaintiffs then appealed to the Bedford County Circuit Court. At no time was Shelter Insurance company named as a defendant in the lawsuit.

On appeal from the General Sessions' judgment, the Plaintiffs, of course, were entitled to a *de novo* trial. T.C.A. § 27-5-108(c) (2000). The circuit court conducted the trial on December 11, 2003. It heard testimony from, *inter alia*, the Plaintiffs, Davenport, and Davenport's mother.

[2]Fortunately for the Plaintiffs, a separate policy with Tennessee Farmers Mutual Insurance Company covered the cost of repairing the show truck. Tennessee Farmers paid the Plaintiffs $3,527.42 to repair the truck.

At the outset of the trial, Ms. Finchum testified. During her July 2000 conversation with Davenport, Ms. Finchum took notes, which were introduced into evidence. The notes indicate that Ms. Finchum and Davenport discussed a commercial fire policy with Shelter Insurance, and that Ms. Finchum understood that this policy included theft coverage. They also apparently discussed a garage keepers' liability policy with Shelter Insurance to cover damage to a customer's automobile while in the Plaintiffs' possession. Ms. Finchum testified that, based on this July 2000 conversation and in reliance on her understanding that the commercial fire policy provided theft coverage, she purchased both the Shelter commercial fire policy and the Shelter garage keepers' liability policy from Davenport. Ms. Finchum was asked on cross examination whether she ever read the terms of the commercial fire policy; she responded, "I did not go through all of these. I looked at the cover sheet." When asked whether she "ever read [her] policies," Ms. Finchum replied, "No, I don't. I trust my agent."

Ms. Finchum described her conversation with Davenport's mother, Patterson, about increasing the liability limit when the Plaintiffs moved Shockwave to its Madison Street location. She testified that she told Patterson that Shockwave was being moved to a new location, and that the store would have more equipment and merchandise—including a showroom with a $30,000 show truck—at this location. She said that she informed Patterson that, for the first 2-3 weeks, the building would not have an electronic security system. Ms. Finchum said that Patterson assured her that she would make the changes to increase Shockwave's liability limit. Subsequently, the Plaintiffs received a document titled "Declarations," which was introduced into evidence at the hearing. This document indicated that, effective April 22, 2002, the liability limit was increased to $75,000. No other terms of the policy were changed.

Ms. Finchum also recounted the events surrounding the break-in. On the morning she learned of the break-in, Ms. Finchum said, she telephoned Davenport, who told her "not to worry about it, that all we had was a $500 deductible and insurance would pay for the rest" of the damage. Ms. Finchum then contacted a glass company about replacing the window that had been broken. When Patterson arrived at the store to photograph the damage, Ms. Finchum testified, Patterson again told the Plaintiffs "not to worry about anything, that it was covered." Based on Patterson's alleged representations that the loss would be covered, Ms. Finchum went forward with replacing the broken window.

After Ms. Finchum testified, the trial court heard testimony from Carrie Shelton ("Shelton"), an acquaintance of the Plaintiffs, and Jason Landers ("Landers"), a glass company employee, who were both at the Shockwave store on the morning of May 10 to help clean up the mess from the break-in. Both Shelton and Landers corroborated Ms. Finchum's testimony about Patterson's assurances that the damage from the break-in was covered by the insurance.

Mr. Finchum then testified. Mr. Finchum said that when the Plaintiffs initially purchased the insurance from Davenport, Davenport came to the Shockwave store and photographed the outside of the building and some parts of the inside of the building. Mr. Finchum also corroborated Ms. Finchum's testimony regarding Patterson's assurances immediately after the break-in that their losses would be covered by insurance.

After the Plaintiffs' case in chief, Davenport testified. She said that, in her July 2000 conversation with Ms. Finchum regarding the commercial fire policy and the garage keepers' liability policy, Ms. Finchum did not request theft coverage. Moreover, Davenport said, she never represented to Ms. Finchum that the commercial fire policy provided such coverage. Davenport testified that the only theft coverage she and Ms. Finchum discussed pertained to the garage keepers' liability policy, which covered, *inter alia*, theft of a customer's vehicle while in the Plaintiffs' possession. Davenport denied telling the Plaintiffs, after the break-in, that the loss due to theft would be covered by the commercial fire policy. She explained that Patterson visited the store after the break-in only to evaluate the damage to determine whether there was any vandalism, which the fire policy might have covered, or damage to a customer's vehicle, which the garage keepers' policy might have covered.

Patterson testified as well. Patterson said that her first contact with Ms. Finchum was a telephone conversation in April 2002, during which they discussed an increase in the liability limit on the commercial fire policy. Patterson denied making any representations that the policy covered theft of any equipment or merchandise or damage to the show truck. Patterson also denied having any discussion about the security system on Shockwave's new building.

The day of the break-in, Patterson said, Davenport asked her to go to the Shockwave store to take photographs of the window that was broken during the break-in. Patterson denied making any representation about coverage for theft while she was at the Shockwave store photographing the damage.

After the conclusion of the proof, on February 15, 2007, the trial court issued its decision. In its memorandum opinion, the trial court found that Ms. Finchum received the Shelter commercial fire policy but never read the portion excluding theft coverage. The trial court noted that the terms of the commercial fire policy excluded theft coverage, but found that Davenport or Patterson represented otherwise to the Plaintiffs. The trial court "further found that the Plaintiffs relied upon this representation to their potential detriment." Regarding the conduct of Davenport and Patterson, after the break-in, the trial court stated:

> The actions of [Davenport and Patterson] after the loss did not in themselves bind the company or estop the denial of coverage. These post-loss actions simply confirm that [Davenport and Patterson] believed that there was coverage. It was clear that the loss was a theft, and there was no reason to prepare an inventory, prepare a claim form, or take photographs if there was no coverage for theft. The Plaintiffs relied on the agent's direction to have the glass replaced, and the Plaintiffs bound themselves to pay for the work on the assurance that there would be coverage.
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> The parties do not recall similarly the conversations at the time the coverage was issued and during the time when the loss was being investigated. However, there were two non-party witnesses at trial who recalled the representations that were made during the investigation of the loss. Both Carrie Shelton and Jason Landers heard Jean Patterson reassure Ms. Finchum that there was coverage, that Ms. Finchum should not worry, and that losses like those suffered were why insurance is carried.

> Judgment will be given in the amount of $11,913.40 less the $3,527.42 already paid by Tennessee Farmers for the loss to the show truck.

Thus, the trial court found that either Davenport or Patterson, or both, represented to the Plaintiffs that the Shelter commercial fire policy included theft coverage. It found that the policy excluded theft coverage, but that the Plaintiffs did not read the exclusion, relying instead on the representation of Davenport or Patterson. It also found that Patterson told Ms. Finchum after the break-in that the loss was covered. A final order was entered on April 3, 2007, in which the trial court concluded that the findings of fact supported "an award of judgment in favor of the Plaintiffs on an estoppel theory."

From this order, Davenport now appeals. The sole issue on appeal is whether the trial court erred in granting a judgment against Davenport, based on a finding that the Shelter commercial fire policy covered the Plaintiffs, and that Davenport was estopped from denying coverage, despite policy language that specifically excludes theft coverage.

Because the trial below was a bench trial, the trial court's findings of fact are reviewed *de novo* upon the record with a presumption of correctness "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d); ***Campbell v. Fla. Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996). The lower court's legal conclusions are reviewed *de novo* with no presumption of correctness. ***Campbell***, 919 S.W.2d at 35.

Davenport first asserts that the Plaintiffs failed to carry their burden of proving that the terms of the policy were misrepresented. However, both Ms. Finchum's testimony and her handwritten notes on her initial conversation with Davenport tend to show that Davenport told Ms. Finchum that the commercial fire policy also provided theft coverage. While Davenport denied misrepresenting the terms of the policy, the trial court apparently credited Ms. Finchum's testimony. ***See Richards v. Liberty Mut. Ins. Co.***, 70 S.W.3d 729, 734 (Tenn. 2002) (stating that a trial court's determination of witness credibility must be given considerable deference on review). Giving appropriate deference to the trial court's determination of the witnesses' credibility, we find that the evidence in the record does not preponderate against the trial court's factual finding. Accordingly, we cannot overturn it on appeal. Tenn. R. App. P. 13(d); ***Campbell***, 919 S.W.2d at 35.

Davenport also argues that the trial court erred in applying the doctrine of equitable estoppel because the Plaintiffs' reliance on any alleged misrepresentation was unreasonable. Davenport asserts that the Plaintiffs are conclusively presumed to have read their insurance policy, and are therefore presumed to have knowledge of both the theft exclusion and the provision precluding amendment of the policy's terms absent endorsement from Shelter. Davenport contends that, because the Plaintiffs are presumed to have knowledge of the policy provisions, any reliance on Davenport's alleged representations was unreasonable.

Here, the Plaintiffs were granted a judgment in Circuit Court against the insurance agent, Davenport, based on "an estoppel theory," that is, that Davenport was estopped to deny that theft was

covered by the Shelter Insurance commercial fire policy.[3] While equitable estoppel may have been an appropriate theory of recovery against the insurer, Shelter Insurance Company, Shelter is not a party to this lawsuit; rather, the claim is asserted against the agent, Davenport. Davenport, of course, is not the insurer, and as such neither denies nor permits coverage under the Plaintiffs' policy. Accordingly, Davenport cannot be "estopped from" denying coverage under the policy.[4]

This lawsuit was initially brought in the General Sessions Court for Bedford County, based on a civil warrant that does not indicate a theory of recovery. It was appealed to the Circuit Court without a formal complaint. As such, the record does not indicate the theory of recovery upon which the Plaintiffs relied in asserting their claim against Davenport. We surmise that the Plaintiffs may have relied on an agency theory of recovery: "One who purports as agent to enter into a contract, upon which the principal is not bound because the agent has contracted without authority or *in excess of his or her authority*, is personally liable for the damage thus occasioned the other contracting party." 3 AM. JUR. 2D *Agency* § 292 (2002) (emphasis added); ***see also*** RESTATEMENT (THIRD) OF AGENCY § 6.10 (2006).

In order to pursue a cause of action against an agent instead of the principal, however, the plaintiff "must have been ignorant of the lack of authority and have acted upon the faith of the express or implied representations that the professed agent had the authority assumed." ***Reed v. Nat'l Found. Life Ins. Co.***, No. 03A01-9603-CV-00081, 1996 WL 718467, *4 (Tenn. Ct. App. Dec. 16, 1996). If an agent, acting on behalf of a principal, contracts with a third party in excess of the agent's authority, the agent impliedly warrants that he has the authority to make the contract and is liable to the third party for damages for loss caused by breach of that warranty, "unless . . . the person who purports to make the contract . . . gives notice to the third party that no warranty of authority is given." RESTATEMENT (THIRD) AGENCY § 6.10; ***see also Reed***, 1996 WL 718467, at *4.

In ***Reed***, the plaintiff purchased a health insurance policy from the defendant insurance company. ***Reed***, 1996 WL 718467, at *1. The plaintiff claimed that the defendant's insurance agent

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[3] An insured such as the Plaintiffs must prove three elements to successfully assert that the doctrine of equitable estoppel precludes an insurer from denying coverage: (1) that he was without both "the knowledge and . . . the means of knowledge of the truth as to the facts in question"; (2) that he reasonably relied upon the conduct or representations of the party to be estopped; and (3) that he took "action based [on those representations] of such a character as to change his position prejudicially." ***Gitter v. Tenn. Farmers Mut. Ins. Co.***, 450 S.W.2d 780, 783 (Tenn. Ct. App. 1969) (citing ***Provident Washington Ins. Co. v. Reese***, 373 S.W.2d 613 (Tenn. 1963)); ***see also Smith v. Shelby Ins. Co. of Shelby Ins. Group***, 936 S.W.2d 261, 264 (Tenn. Ct. App. 1996); ***Robinson v. Tenn. Farmers Mut. Ins. Co.***, 857 S.W.2d 559, 563 (Tenn. Ct. App. 1993). Where an insured asserts equitable estoppel against an insurance company, "[t]he burden of proof is on the insured to prove that a misrepresentation was made and that the insured reasonably relied upon the misrepresentation." ***Robinson***, 857 S.W.2d at 563 (citing ***Bill Brown Constr. Co. v. Glens Falls Ins. Co.***, 818 S.W.2d 1 (Tenn. 1991)). Therefore, if an insured successfully establishes the elements of estoppel, then the insurer is estopped from denying coverage based on exclusionary language in the policy that conflicts with the misrepresentation.

[4] In their appellate brief, the Plaintiffs argue that the trial court should be affirmed based on ***Bill Brown Constr. Co. v. Glen Falls Ins. Co.***, 818 S.W.2d 1 (Tenn. 1991), which, of course, involves a claim against an insurance company, not an insurance agent.

had told him that coverage would become effective upon signing certain forms and payment of the first monthly premium. ***Id.*** However, the application for the policy stated that the applicant understood "that the policy shall not be effective until the policy has been actually issued, with first premium paid . . . ." ***Id.*** The application also contained a provision in which the plaintiff acknowledged, "I . . . understand that the agent cannot change, alter or amend the policy." ***Id.*** The defendant insurance company received the application on January 12, 1994. ***Id.*** The plaintiff suffered a heart attack on January 15. ***Id.*** The defendant insurance company learned of the plaintiff's heart attack prior to issuing the policy, so the policy was never issued. Accordingly, when the plaintiff filed a claim, the defendant denied coverage. ***Id.***

The plaintiff sued both the insurance company and the agent who misrepresented the date on which the insurance coverage would become effective. ***Id.*** Both the insurance company and the agent moved for summary judgment. ***Id.*** at *2. The trial court denied both motions, and the parties received permission to appeal the interlocutory order. The Court of Appeals reversed. Addressing the claim against the defendant agent, the Court stated:

> The documents signed by the plaintiff acknowledging the lack of authority of [the] agent are a complete refutation of his purported cause of action against the agent.
>
> He cannot assert a claim against the agent while acknowledging that he was aware that the agent had no authority in the premises. The motion of the agent for summary judgment is therefore well-taken

Id. at *4.

In this case, the commercial fire policy with Shelter states that its terms "can be amended or waived only by endorsement issued by [Shelter Insurance Company] and made a part of this policy." Ms. Finchum admitted that she received the policy. The terms of the policy unambiguously excluded coverage for damage or loss due to theft, and stated clearly that only Shelter Insurance had authority to alter or amend the terms of the policy. This language was clear notice to the Plaintiffs that neither Davenport nor Patterson had the authority to alter the provision in the policy excluding coverage for damage or loss due to theft. Moreover, the Plaintiffs do not allege that Davenport misrepresented that she had authority to alter the policy. They assert only that they did not read the policy. The plaintiff in ***Reed*** made a similar assertion; in response, the ***Reed*** court stated: "While the plaintiff alleges that he did not read the documents, it is settled law in Tennessee that he is nonetheless charged with knowledge of their contents." ***Id.*** at *3 (citations omitted). We agree. Thus, we must conclude that the trial court erred in granting the Plaintiffs a judgment against Davenport.

Accordingly, the decision of the trial court is reversed. The cause is remanded for entry of judgment in favor of Appellant Tina Davenport Patterson. The costs of this appeal are to be taxed to the Appellees, Jeff Finchum and Michelle Finchum d/b/a Shockwave Customs, for which execution may issue if necessary.

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HOLLY M. KIRBY, JUDGE